

Burke



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Discount Machinery & Equipment, Inc.  
**File:** B-231068.2  
**Date:** January 25, 1989

### DIGEST

1. Protest based upon alleged improprieties in specifications which are apparent from the face of the solicitation is untimely where not filed until after due date for initial proposals.
2. Protest of agency's decision not to waive a first article testing requirement is denied where firm offers to modify an item previously accepted by the agency, and where unmodified item does not comply with the current specifications.

### DECISION

Discount Machinery & Equipment, Inc., protests the award of a contract to Themac, Inc., under request for proposals (RFP) No. DLA400-88-R-0005, issued by the Defense Logistics Agency (DLA) for drill grinding machines. Discount argues that the specifications of the RFP prevented it from offering its standard product, causing the firm to unnecessarily increase its price. Discount also alleges that the agency improperly refused to waive its first article approval test.

We dismiss the protest in part and deny it in part.

The RFP, issued November 3, 1987, solicited proposals for 56 drill grinding machines, constructed in accordance with military specification MIL-G-45072F, to be delivered to four different locations. The specification required, among other things, that the drill grinding machines have a 5-inch grinding wheel and 1/4 horsepower motor. The RFP required first article approval and a first article test report. DLA, however, reserved the right to waive the first article requirement where DLA had previously accepted identical or similar products from the offeror. Firms requesting waiver of the first article requirement were required to list prior

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contracts which they believed showed that first article testing was not necessary.

Proposals were received on December 3. Themac and Discount were subsequently found to be within the competitive range after the low offeror withdrew from the competition. In its proposal, Discount offered the "Darex Mfg. Co. Model M-4," which it claims is its "standard machine" and which has a 6-inch grinding wheel and a 1/3-horsepower motor.

The agency states that in order to obtain a clarification of Discount's offer, the agency called Discount to verify that its offer met the specifications. During these discussions, Discount agreed to modify its standard product to meet the requirement for a 5-inch grinding wheel and 1/4 horsepower motor, and stated that its offer would meet the specification. The agency then requested best and final offers from both Discount and Themac.

Based on an earlier recommendation by the agency's Directorate of Quality Assurance, the agency waived the first article requirement for Themac but did not waive the requirement for Discount. The agency concluded, with respect to Discount, that the item Discount previously furnished under a referenced purchase order were not in compliance with the current specification. The price submitted by Themac, without first article testing, was lower than Discount's price, which included the first article testing. Consequently, DLA awarded the contract to Themac on October 14, 1988. This protest followed.

Discount first argues that the RFP specification requiring prospective contractors to provide a machine with 1/4-horsepower and a 5-inch wheel "forced" it to modify a standard machine, causing it to increase its price. Discount asserts further that its unmodified standard machine should have been acceptable under proper specifications because it generally exceeds the government's needs.


This contention concerns alleged improprieties in the RFP's specifications which were apparent from the face of the RFP; accordingly, to be considered timely, any protest on this ground had to be filed before the due date for initial proposals. 4 C.F.R. § 21.2(a)(1) (1988); Eastern Technologies, Inc., B-232198, Aug. 24, 1988, 88-2 CPD ¶ 177. Since this protest ground was not filed until after award was made, we dismiss it as clearly untimely.

Next, Discount alleges that DLA's decision not to waive first article tests for its product is not justified because DLA awarded the firm a previous contract for its

allegedly acceptable standard machine. We find this argument to be without merit.

A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to assure product compliance with the specifications. Kinross Manufacturing Corp., B-229974, Mar. 9, 1988, 88-1 CPD ¶ 245. The determination of whether an offeror qualifies for waiver of first article testing is within the discretion of the contracting agency, and an agency's determination to waive or not to waive first article testing for a particular offeror is subject to question only where it is shown to be unreasonable. Power Trol, Inc., B-227954, Oct. 5, 1987, 87-2 CPD ¶ 335. Here, the agency states, and the record shows, that the contract pursuant to the purchase order that Discount listed in its offer as entitling the firm to waiver of first article was for its unmodified standard product, which does not comply with the current specification. Accordingly, we think that the agency's refusal to waive first article for Discount was reasonable.

The protest is dismissed in part and denied in part.



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